APPENDIX

APPENDIX A

In the Court of Criminal Appeals of Tennessee, Jackson
September Session, 1973

H. O. Forgy, III, Plaintiff in Error, v. State of Tennessee, Defendant in Error.	No. 13 Madison Criminal Hon. William H. Williams, Judge (Selling a Controlled Substance)

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Affirmed

Opinion Filed: February 13, 1974

Charles H. O'Brien, Judge

OPINION

This defendant was convicted by a jury of selling heroin and sentenced to five years confinement in the State Penitentiary. The trial judge entered judgment accordingly. Motion for new trial was overruled, and defendant appeals making nine assignments of error.

The third, fourth and eighth assignments predicate error to the trial court on the premise that the State's agent who effected defendant's arrest was an accomplice. The theory being that the uncorroborated testimony of this witness established the corpus delicti and therefor a new trial was justified.

The undercover agent who testified about the delivery and sale of the heroin which brought about defendant's indictment was an officer of the Jackson, Tennessee, Municipal Police Department. According to his testimony the delivery of the controlled substance took place outside the city limits of Jackson. The payment occurred on the next day within the jurisdictional limits of that municipality. He also testified that when he set out for defendant's residence he was not aware that it was outside the city limits. When he discovered this fact, and the delivery of the alleged heroin had been made, he made the decision to conclude the sale on the next day at a place within the city and left his watch for security until payment could be made.

In *Halquist v. State*, — Tenn.Crim.App. —, 489 SW2d 88, this court held:

> "Likewise unmeritorious is the defendant's complaint that the trial court rejected his theory that the undercover agent was an accomplice and declined to instruct the jury that the testimony of an accomplice must be corroborated. The applicable rule of law is stated as follows in 23 C.J.S. Criminal Law Sec. 788, p. 11:

> 'A detective or police officer who is engaged in attempts to discover violations of the law is not an accomplice of one charged with such a violation, even though the detective may have been instrumental in procuring the specific violation of the law on which the prosecution is based. Familiar illustrations of this principle are found in cases where detectives or other officers, investigating alleged illegal sales of liquor, purchase such liquor for the purpose of securing evidence, or where detectives join a conspiracy or a criminal organization for the purpose of exposing it and bringing the criminals to punishment.
>
> Where informers or agents, under the direction of public authorities, continue to act with their guilty confederates until the matter can be so far advanced and matured as to insure the conviction and punishment of such confederates, the informers are not accomplices.' "

It makes little difference, as in this case, that the pursuit of the investigation leads the officer beyond the limits of his jurisdiction to arrest, or otherwise function as a police officer. It would be a curious anomoly if we were to say that this officer, having taken care to conceal his identity, and having infiltrated into the milieu where persons engaged in the use of and trafficking in drugs, while in the company of a drug user leading him to a source of supply must forego and desist from his investigation when he crossed the city line. Such conduct could as easily have endangered his life as it could have impaired his investigative efforts.

As set forth in one of the earlier cases cited in defendant's brief, "an accomplice is defined to be a person who knowingly, voluntarily, and with common intent with the principle offender, unites in the commission of a crime." *Clapp v. State*, 94 Tenn. 186, 30 S.W. 214 (1894). In this case the undercover agent

drove another individual, Buck Brown, to defendant's trailer home where each of them purchased a small aluminum foil packet. The one sold to the agent subsequently was analyzed to be heroin. Had, under these circumstances, the State's agent observed defendant sell to Brown only, and then reported him for arrest, would he then be an accomplice? The argument is too frivolous for consideration. We hold that the undercover agent cannot be considered as as accomplice in this case, and, although we do find other evidence in this record which points to defendant's guilt, the corroboration of his testimony was unnecessary.

The first and second assignments of error otherwise attack the weight and sufficiency of the convicting evidence.

Clarence Shaw testified that on the date of the offense for which defendant was convicted he was an undercover police agent for the city of Jackson, assigned to the Narcotic Division. At about 9:30 or 10:00 o'clock p.m., on December 8th, 1971, in the company of an individual named Buck Brown, he visited the trailer home of defendant on Steam Mill Ferry Road in Madison County outside the city limits of Jackson. He made an in-court identification of defendant as the person whom he visited. Three persons other than the defendant were present in the trailer when they arrived there. He and Brown accompanied defendant from the front room of the trailer to a rear bedroom where defendant produced a vial containing four aluminum foil packets which he distributed. The witness gave a description of the room arrangement of the trailer. When they returned to the front room three persons including defendant and Brown prepared and injected the substance contained in their individual foil packages. The agent placed his packet in his pocket. After leaving the trailer he went to his apartment where it was labeled and tagged. Subsequently the substance contained in the packet was analyzed as heroin. He did not remember having ever met defendant before.

The evidence is conflicting in that defendant denied having sold heroin. He admitted that the undercover agent had come to his trailer in the company of Buck Brown, but stated it was between 5:30 and 6:00 in the afternoon. He admitted that Patterson was present but denied the presence of any others. He denied they went to the rear of the trailer; denied there was any sale of any nature; denied he had accepted the wrist watch as security. He said that Shaw and Brown stayed approximately 45 minutes during that time everyone there except himself smoked some marijuana which Shaw had brought with him. He denied having ever seen the undercover agent before his visit to the trailer. Defendant's testimony was generally corroborated by Jimmy Patterson.

The proposition that the greater weight of the total evidence preponderates in favor of defendant's innocence must be tested by the rule in this State, that a jury's verdict of guilty approved by the trial judge establishes the credibility of the witnesses supporting the verdict, displaces the presumption of innocence that attached to the defendant in the trial court, and raises a presumption of guilt, putting on defendant the burden of showing, on appeal, that the evidence preponderates against the verdict and in favor of his innocence. *Powell v. State*, — Tenn. Crim.App. —, 489 S.W.2d 538. We cannot find appellant has carried this burden and these assignments must be overruled.

The fifth assignment complains that the trial court erred in admitting into evidence, over defendant's objection, testimony that at the time of the alleged offense defendant had long hair, a beard, mustache, and other physical characteristics, which implied he was a "hippie"; and in admitting into evidence testimony that defendant and one of his witnesses had social relationships with young black people. That this was prejudicial because it categorized defendant as a "hippie", and characterized him and his witness as persons who mixed and mingled freely with young black persons. That the introduction of this

testimony on the part of the State was by design, and calculated to inflame passion, bias, and prejudice on the part of the jury.

We apply ourself first to the issue of the testimony relative to defendant's appearance. The witness, Shaw, was asked if there was a difference in defendant's appearance from that which existed on the date of the offense. He testified over objection that at that time defendant had a beard, a longer mustache, and longer hair. He was then asked if there was any question in his mind as to the identity of defendant even though there was this change in his appearance. These questions surely went to the identity of defendant and were proper. The other reference to defendant's appearance came on cross-examination when he was asked to describe his hair on the night that Shaw came to his house. We do not think the inquiry into this matter was extensive or incontinent. If the defendant assumed the guise and physical appearance which categorized him as a "hippie", and therefore a member and participant of the drug culture, it is certainly not the State which places him in that category by inquiring into his manner of dress and appearance.

The first reference to defendant's association with blacks which is complained of came on cross-examination of the defendant. He had stated on direct examination that the undercover agent had come to his trailer with Buck Brown. He had testified he had known Brown for about a year. Brown was in the court room at the time these questions were posed. It was obvious he was a black man. On cross-examination he was asked if Brown was not a good friend, and how many times he had visited in defendant's home. The State's proof was that Brown, among others, received and used heroin at the trailer. We think this inquiry into the relationship with Brown was proper cross-examination. The other racial reference complained of came in the cross-examination of defense witness, Patterson. He had testified on direct examination that he was acquainted with Brown. On cross-examination he testified that

he did not recall having ever seen the undercover policeman, Clarance Shaw, also a black man, before the night of December 8th, 1971. He was cross-examined about his personal relationship with Brown, which had included several trips together to Memphis, and if he had made any trips from Memphis with any other colored boys than Brown. When he denied knowing Shaw, he was cross-examined about his association with Shaw and other black persons at a nightclub in Jackson. A review of the complete Bill of Exceptions makes it apparent that this was proper cross-examination, made for the purpose of introducing relevant evidence into the record, and not designed, as is suggested, to inflame the passion or bias of the jury to the prejudice of defendant. In only one instance was an objection raised by the defense, which was properly overruled by the trial court. We find the assignment to be without merit.

Regarding the sixth assignment, we find no error in the admission into evidence of a vial which contained a label marked "heroin". When the introduction of this small plastic bottle was first attempted, the objection to its admission was sustained. After the witness from the State toxicology laboratory identified the substance contained in the plastic vial as heroin the vial was admitted in evidence as an exhibit over objection of the defendant. It is clear from the testimony of Lt. J. R. Moore that he attached the label on the vial in question. It is equally clear from examination that he made the notation in question although he did not testify so directly. We do not find that defendant was prejudiced by the admission of this exhibit and the assignment is overruled.

The seventh assignment charges error to the trial court in refusing to instruct the jury in accordance with defendant's special request for instructions on the absent witness rule.

The State did not call Buck Brown as a witness. During the direct testimony of the defendant, Brown was excused from the

courtroom. On cross-examination defendant stated he planned to use Brown as a witness. It is defendant's theory that the jury should have been instructed to the effect that this witness would testify favorably to the State, and that the charge as given was inadequate and prejudicially effected the defense. It is highly unlikely that Brown would have confirmed the testimony of the State's witness that he had received, and injected himself with heroin in defendant's trailer. He was equally available to both parties, and the State was under no obligation to call him as a witness. We hold that the statement of law charged by the trial judge in this case was correct and justified under the proof before the jury.

By the final assignment error is charged in failing to grant defendant's motion for new trial based on newly discovered evidence.

In his direct testimony the State's witness testified he had never used marijuana. Both defendant, and his witness, Patterson, testified that defendant smoked marijuana while he was in defendant's trailer. At his motion for new trial defendant introduced the affidavit of a witness in which he stated he had observed the undercover agent engaged in the act of smoking marijuana sometime in the month of November or December, 1971.

The matter of granting a new trial on the basis of newly discovered evidence is a discretionary matter with the trial judge. *Moore v. State*, 96 Tenn. 209, 33 S.W. 1046; *Hawkins v. State*, 220 Tenn. 383, 417 S.W.2d 774. We find no abuse of discretion on the part of the trial judge. Further, newly discovered evidence which is merely cumulative and newly discovered evidence which is merely impeaching will not constitute grounds for a new trial. *Freshwater v. State*, 2 Tenn.Crim.App. 314, 453 S.W.2d 446.

All assignments are overruled, and the judgment of the trial court affirmed.

/s/ Charles H. O'Brien
Charles H. O'Brien
Judge

Concur:

/s/ Charles Galbreath
Charles Galbreath
Judge

/s/ Robert K. Dwyer
Robert K. Dwyer
Judge

APPENDIX B

In the Supreme Court of Tennessee
At Jackson

H. O. Forgy, III,
Petitioner,
vs.
State of Tennessee,
Respondent.
} Madison Criminal.

ORDER

(Filed July 15, 1974)

Upon consideration of the petition for the writ of certiorari and the motion of petitioner's to strike and expunge from the record the reply of the State on the ground that said reply was filed after the expiration of the time permitted by the rules, the Court is of the opinion that the petition for the writ of certiorari is without merit and should be denied and, therefore, the motion to strike and expunge from the record the State's reply should also be denied since the matter is moot. It is so Ordered.

Per Curiam

APPENDIX C

State of Tennessee

Supreme Court

Court of Appeals

Court of Criminal Appeals

Jewell Redden, Clerk

Jackson, August 12, 1974

H. O. Forgy, III,
vs.
State of Tennessee.
} Madison Criminal No. 13

Petition to reconsider denial of certiorari is **denied.**

No Written Opinion.

Respectfully

JEWELL REDDEN
Clerk

APPENDIX D

In the Court of Criminal Appeals of Tennessee
Western Division

H. O. Forgy, III,
Plaintiff in Error,
vs.
State of Tennessee,
Defendant in Error.

Madison Criminal No. 13

Order Granting Stay of Execution of Judgment Pending Certiorari

(Filed September 10, 1974)

This cause came on to be heard on plaintiff in error's Motion to Stay Execution of Judgment Pending Certiorari, argument of counsel, and on the entire record from all of which it appearing to the Court that the plaintiff in error's Motion to Stay Execution Pending Certiorari should be and is hereby granted, provided that plaintiff in error's Petition for Certiorari be filed with the Clerk of the United States Supreme Court no later than thirty days from the date of this order.

It is therefore ordered that the execution of the judgment and sentence in this case be and is hereby stayed pending the filing of plaintiff in error's Petition for Certiorari in the Supreme Court of the United States and the disposition of said Petition.

It is further ordered that if plaintiff in error's Petition for Certiorari is not filed with the Clerk of the United States Supreme Court no later than thirty days from this order, the judg-

ment and sentence of the lower court will be executed forthwith.

It is further ordered that the $10,000.00 bond presently in effect in this cause be and is hereby allowed to remain in effect subject to the above provisions of this order.

This the 10th day of September, 1974.

ROBERT K. DWYER
Judge

JOHN A. MITCHELL
Judge

WILLIAM S. RUSSELL
Judge

Approved for Entry:

HENRY V. SUTTON
Attorney for Plaintiff in Error

WILLIAM B. (Illegible)
Assistant Attorney General

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-397

H. O. FORGY, III,

Petitioner

v.

STATE OF TENNESSEE,

Respondent

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

H. O. FORGY, III,

Petitioner

v.

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Respondent

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

JURISDICTION

Respondent admits jurisdiction, but denies that it raises a Federal constitutional question.

OPINIONS BELOW

The Petitioner's brief, Appendix A, contains the opinion of the Court of Criminal Appeals of Tennessee; Appendix B and Appendix C contain the action of the Supreme Court

of Tennessee denying writ of certiorari, and Appendix D contains the order of the Court of Criminal Appeals permitting bail bond pending action of this Honorable Court.

QUESTIONS PRESENTED

QUESTION ONE

DID THE PROSECUTING ATTORNEY INJECT RACIAL AND SOCIAL PREJUDICES INTO THE TRIAL THROUGH QUESTIONING THE PETITIONER AND OTHER WITNESSES IN SUCH A MANNER AS TO VIOLATE THE RIGHTS OF THE PETITIONER?

QUESTION TWO

IS AN UNDERCOVER AGENT AN ACCOMPLICE UNDER THE LAWS OF TENNESSEE SO THAT HIS TESTIMONY MUST BE CORROBORATED, AND IF SO, DOES THIS RAISE A FEDERAL CONSTITUTIONAL QUESTION?

BRIEF STATEMENT OF THE CASE

On December 8, 1971 an undercover agent for the Jackson, Tennessee Police Department got with a friend of the defendant (petitioner here) in Jackson, and they drove some five miles outside the city limits to where the defendant resided in a trailer. Others, in addition to the defendant, were present.

There the undercover agent, Shaw, together with his companion Brown, purchased for $20.00 a pack each of drugs and, since they were outside the city limits, Shaw left his watch as security. The following day Shaw met the defendant inside the city, where he gave him $20.00 and redeemed his watch.

Any other pertinent facts regarding the evidence will be covered in the following argument.

ARGUMENT

QUESTION ONE

The defendant contends that Shaw, the undercover police officer, was an accomplice to the selling of heroin and therefore his testimony must have been corroborated before the conviction can stand. Defendant bases this contention on the basis that Shaw was outside of the territorial jurisdiction of his police department when the alleged crime occurred.

The State on the other hand takes the position that Shaw was not an accomplice. This position is based upon two premises: first, that a buyer of a narcotic is not an accomplice to the seller and second, that one participating in a crime solely to assist law enforcement officials in apprehending other participants in said crime is only a "feigned accomplice."

The defendant has argued the inconsistency in criminal law of requiring corroboration of the testimony of a child incapable of consenting to participating in a crime and has attempted to formulate a rule defining accomplice from this inconsistency. The leading case of *Monts v. State*, 214 Tenn. 171, 379 S.W.2d 34, speaks to both of these issues:

> "It is well settled in this State, by judicial decision, and in many other American jurisdictions, by statutory enactment, that a defendant cannot be convicted upon the uncorroborated testimony of an accomplice in his crime. *Sherrill v. State*, 204 Tenn. 427, 321 S.W.2d 811 (1959); *Scott v. State*, 207 Tenn. 151, 338

S.W.2d 581 (1960). As to who is an accomplice within this rule is a point upon which the American cases are not in complete harmony. (E.g., see annotation in 53 A.L.R.2d 817). The definition most often found in the cases is the one recited in Wharton's Criminal Evidence (12th Ed.) sec. 448 at page 229: 'a person who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime.' The test generally applied by the courts in this country is whether the alleged accomplice could be indicted for the same offense charged against the defendant. Wharton's Criminal Evidence (12th Ed.) sec. 448 at page 230. *Casone v. State*, 193 Tenn. 303, 246 S.W.2d 22 (1952). There are exceptions to this test such as where the accomplice or participant in the defendant's crime is a child of such tender years as to be incapable of consenting to the crime in which he participates. Corroboration in such a case is required even though under the above test, the child would not be considered an accomplice. *Sherrill v. State*, supra; *Scott v. State*, supra. But for the most part, the test cited is the one used in determining whether the accomplice rule applies to given testimony.

"In Tennessee, an accessory after the fact is not subject to indictment for the offense committed by his principal; but rather he is guilty of a separate and distinct offense defined in sec. 39-112, T.C.A. Thus under the generally accepted test, an accessory after the fact could not be considered as an accomplice within the rule requiring that the testimony of an accomplice be corroborated. This appears to be the result reached in all the States that have passed on this question with the exception of Arkansas and Texas.

14 Am. Jur., Criminal Law, sec. 112; 23 C.J.S. Criminal Law sec. 792; *State v. Bowman*, 92 Utah 540, 70 P.2d 458, 111 A.L.R. 1393 (1937); *State v. Phillips*, 18 S.D. 1, 98 N.W. 171 (1904); *State v. Riddell*, 38 R.I. 506, 96 A. 531 (1916); *State v. Umble*, 115 Mo. 452, 22 S.W. 378 (1893); *Levering v. Commonwealth*, 132 Ky. 666, 117 S.W. 253 (1909)." Tenn. 191-192.

The defendant was convicted of violating T.C.A. § 52-1432 which states:

"(a) except as authorized by §§ 52-1408 - 52-1448, it is unlawful for any person to manufacture, deliver, sell, or possess with intent to manufacture, deliver or sell, a controlled substance. (1) Any person who violates this section with respect to: (A) A controlled substance classified in Schedule I is guilty of a felony and upon conviction shall be imprisoned for not less than five (5) years or more than fifteen (15) years and in addition thereto may be fined not more than eighteen thousand dollars ($18,000.00);"

Heroin is classified in Schedule I, T.C.A. § 52-1413.

Shaw could not have been indicted for the same offense as the defendant, because there was no intent upon his part to manufacture, deliver or sell. Shaw could have only been indicted under T.C.A. § 52-1432(b) which states:

"It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by §§ 52-1408 - 52-1448.

"(1) Any person who violates this subsection shall be guilty of a misdemeanor and, upon first conviction, be sentenced to confinement in a county jail or workhouse for a period not to exceed eleven (11) months, twenty-nine (29) days and/or fined an amount not to exceed one thousand ($1,000) or may have the sentence pending upon him for this violation suspended and may be as a condition of the suspension be required to participate in a program of rehabilitation at a drug treatment facility operated by the state or a comprehensive community mental health center."

These are clearly separate offenses.

Tennessee has clearly made this distinction. *Pennington v. State*, 478 S.W.2d 892, and *Monts v. State*, *supra* (an accessory after the fact is not an accomplice to the principal); *Harris v. State*, 75 Tenn. 124, 7 Lea 124 (receiving stolen goods or compounding a felony is not an accomplice to robbery); *Moore v. State*, 432 S.W.2d 684 (larceny is not an accomplice to receiving and concealing stolen goods); *Smartt v. State*, 80 S.W. 586, 112 Tenn. 539 (the subject of an abortion is not an accomplice to the abortion). Also see 23 C.J.S. Criminal Law § 798(20) which states the black letter law:

"In general, in prosecutions for violations of narcotic laws, the purchasers of the drugs are not regarded as accomplices."

The defendant correctly states that the law in this State is that a detective or police officer engaged in an attempt to discover violations of the law is not an accomplice. *Halquist v. State*, 489 S.W.2d 88, 94 (1972). This rule of law is based on the proposition that one who does not instigate a crime, but merely accompanies the instigators to facilitate their subsequent prosecution has no criminal

intent and is a mere "feigned accomplice." The issue before this court is whether a paid undercover agent whose job takes him outside the territorial jurisdiction of his employer, suddenly becomes an accomplice and subject to prosecution. For the law to supply the necessary criminal intent when the border is passed would be against sound policy. The overriding interest is in detecting crimes and successfully prosecuting these crimes. In *People v. Pigg*, 308 P.2d 884, the California Court held that a citizen who, without contacting the law enforcement authorities, participated in a burglary to assist in the criminal prosecution, was a "feigned accomplice" and his testimony did not require corroboration.

The defendant cites *Elliott v. State*, 92 Tex. Cr. R. 571, 244 S.W. 1007, in support of his contention that Shaw was an accomplice. That case merely held that it was a jury question as to whether the witness was an actual or a "feigned accomplice," and that the jury upon proper request should have been charged on these points. Please note that Texas is an exception to the general rule defining accomplice as set out in A. above.

In the instant case there was no evidence to rebut Shaw's testimony that he was a "feigned accomplice" and there was no objection or special request made on this point.

The Court of Criminal Appeals replied to this question as follows:

> The third, fourth and eighth assignments predicate error to the trial court on the premise that the State's agent who effected defendant's arrest was an accomplice. The theory being that the uncorroborated testimony of this witness established the corpus delicti and therefor a new trial was justified.

The undercover agent who testified about the delivery and sale of the heroin which brought about defendant's indictment was an officer of the Jackson, Tennessee, Municipal Police Department. According to his testimony the delivery of the controlled substance took place outside the city limits of Jackson. The payment occurred on the next day within the jurisdictional limits of that municipality. He also testified that when he set out for defendant's residence he was not aware that it was outside the city limits. When he discovered this fact, and the delivery of the alleged heroin had been made, he made the decision to conclude the sale on the next day at a place within the city and left his watch for security until payment could be made.

In *Halquist v. State*, *supra*, this court held:

"Likewise unmeritorious is the defendant's complaint that the trial court rejected his theory that the undercover agent was an accomplice and declined to instruct the jury that the testimony of an accomplice must be corroborated. The applicable rule of law is stated as follows in 23 C.J.S. Criminal Law Sec. 788, p. 11:

> 'A detective or police officer who is engaged in attempts to discover violations of the law is not an accomplice of one charged with such a violation, even though the detective may have been instrumental in procuring the specific violation of the law on which the prosecution is based. Familiar illustrations of this principle are found in cases where detectives or other officers, investigating alleged illegal sales of liquor, purchase such liquor for the purpose of securing evidence, or where detectives join a conspiracy or a crimi-

> nal organization for the purpose of exposing it and bringing the criminals to punishment.
>
> Where informers or agents, under the direction of public authorities, continue to act with their guilty confederates until the matter can be so far advanced and matured as to insure the conviction and punishment of such confederates, the informers are not accomplices.'"

It makes little difference, as in this case, that the pursuit of the investigation leads the officer beyond the limits of his jurisdiction to arrest, or otherwise function as a police officer. It would be a curious anomoly if we were to say that this officer, having taken care to conceal his identity, and having infiltrated into the milieu where persons engaged in the use of and trafficking in drugs, while in the company of a drug user leading him to a source of supply must forego and desist from his investigation when he crossed the city line. Such conduct could as easily have endangered his life as it could have impaired his investigative efforts.

As set forth in one of the earlier cases cited in defendant's brief, "an accomplice is defined to be a person who knowingly, voluntarily, and with common intent with the principle offender, unites in the commission of a crime." *Clapp v. State*, 94 Tenn. 186, 30 S.W. 214 (1894). In this case the undercover agent drove another individual, Buck Brown, to defendant's trailer home where each of them purchased a small aluminum foil packet. The one sold to the agent subsequently was analyzed to be heroin. Had, under these circumstances, the State's agent observed defendant sell to Brown only, and then reported him for arrest, would he then be an accomplice? The argument is too frivo-

lous for consideration. We hold that the undercover agent cannot be considered as an accomplice in this case, and, although we do find other evidence in this record which points to defendant's guilt, the corroboration of his testimony was unnecessary.

QUESTION TWO

In this Assignment of Error, the defendant has raised the issue as to whether the Attorney General was attempting to play upon the racial biases of the jury. It should be noted that this Bill of Exceptions does not reflect whether the defendant was black or white and whether Jimmy Patterson was black or white. The Bill of Exceptions does reflect that Buck Brown was black. However, the State contends that even if this record did reflect that the defendant is white and Jimmy Patterson is white there is no evidence of an attempt on the Attorney General's part to appeal to the prejudices and biases of the jury. The defendant first argues that it was error for the Attorney General to bring out the point that Buck Brown frequently visited the trailer of the defendant. Buck Brown is the one who accompanied the undercover agent to the defendant's trailer. This testimony only served to substantiate the testimony of Shaw by showing that the defendant and Buck Brown were good friends and the defendant would not be suspicious of any individual who accompanied Buck Brown to purchase heroin. It might also be pointed out that this record does not reveal whether the undercover agent was white or black.

The questions concerning Jimmy Patterson's association with a black girl in a party club at Jackson, have previously been covered. There was no racial issue injected into this court proceeding, and as a result this Assignment of Error is totally without foundation.

The Tennessee Court of Criminal Appeals found, in reference to this assignment, as follows:

> The fifth assignment complains that the trial court erred in admitting into evidence, over defendant's objection, testimony that at the time of the alleged offense defendant had long hair, a beard, mustache, and other physical characteristics, which implied he was a "hippie"; and in admitting into evidence testimony that defendant and one of his witnesses had social relationships with young black people. That this was prejudicial because it categorized defendant as a "hippie", and characterized him and his witness as persons who mixed and mingled freely with young black persons. That the introduction of this testimony on the part of the State was by design, and calculated to inflame passion, bias, and prejudice on the part of the jury.
>
> We apply ourself first to the issue of the testimony relative to defendant's appearance. The witness, Shaw, was asked if there was a difference in defendant's appearance from that which existed on the date of the offense. He testified over objection that at that time defendant had a beard, a longer mustache, and longer hair. He was then asked if there was any question in his mind as to the identity of defendant even though there was this change in his appearance. These questions surely went to the identity of defendant and were proper. The other reference to defendant's appearance came on cross-examination when he was asked to describe his hair on the night that Shaw came to his house. We do not think the inquiry into this matter was extensive or incontinent. If the defendant assumed the guise and physical appearance which categorized him as a "hippie", and therefore a member and participant of the drug culture, it is certainly not the State which

places him in that category by inquiring into his manner of dress and appearance.

The first reference to defendant's association with blacks which is complained of came on cross-examination of the defendant. He had stated on direct examination that the undercover agent had come to his trailer with Buck Brown. He had testified he had known Brown for about a year. Brown was in the courtroom at the time these questions were posed. It was obvious he was a black man. On cross-examination he was asked if Brown was not a good friend, and how many times he had visited in defendant's home. The State's proof was that Brown, among others, received and used heroin at the trailer. We think this inquiry into the relationship with Brown was proper cross-examination. The other racial reference complained of came in the cross-examination of defense witness, Patterson. He had testified on direct examination that he was acquainted with Brown. On cross-examination he testified that he did not recall having ever seen the undercover policeman, Clarance Shaw, also a black man, before the night of December 8th, 1971. He was cross-examined about his personal relationship with Brown, which had included several trips together to Memphis, and if he had made any trips from Memphis with any other colored boys than Brown. When he denied knowing Shaw, he was cross-examined about his association with Shaw and other black persons at a nightclub in Jackson. A review of the complete Bill of Exceptions makes it apparent that this was proper cross-examination, made for the purpose of introducing relevant evidence into the record, and not designed, as is suggested, to inflame the passion or bias of the jury to the prejudice of defendant. In only one instance was an objection

raised by the defense, which was properly overruled by the trial court. We find the assignment to be without merit.

CONCLUSION

The respondent, therefore, respectfully insists that no constitutional question is raised as a result of the petitioner being required to discuss his appearance at the time of the offense, as contrasted with his appearance in court for purposes of establishing identity, and questions relating to the type of people with whom he associates for the purpose of showing guilty knowledge likewise raises no Federal constitutional question.

Secondly, respondent insists that an undercover agent is not an accomplice and that no corroboration of his testimony, therefore, is required.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing reply on behalf of respondent to petition for writ of certiorari to the Court of Criminal Appeals of Tennessee has this day been forwarded, by first class postage paid mail, to adversary counsel herein, Honorable Henry V. Sutton, Attorney-at-Law, Suite 2904, 100 North Main Building, Memphis, Tennessee 38103, and Honorable Kemper B. Durand, Attorney-at-Law, Suite 1105, Union Planters Bank Building, Memphis, Tennessee 38103, this ____ day of October, 1974.

/s/ Robert H. Roberts
ROBERT H. ROBERTS,
Advocate General

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Text Cited

Wharton's Criminal Evidence, Volume 2, 12th Edition 1955, § 448 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

H. O. FORGY, III,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

REBUTTAL TO REPLY

Of Respondent to Petition for Writ of Certiorari to the Court of Criminal Appeals of Tennessee

Henry V. Sutton and Kemper B. Durand, retained counsel for Petitioner, H. O. Forgy, III, find it necessary to submit a rebuttal to Respondent's reply.

REBUTTAL

Question One

As stated by Petitioner:

(1) Were Petitioner's constitutional rights to due process and/or equal protection of the law violated by the Trial Court's

allowing the State's attorney to inject racial and social prejudices into the trial through questioning of Petitioner and other witnesses?

As stated by Respondent:

(1) Did the prosecuting attorney inject racial and social prejudices into the trial through questioning the Petitioner and other witnesses in such a manner as to violate the rights of the Petitioner?

The record clearly shows that the State's attorney subjected petitioner as well as other witnesses to a line of questioning calculated to inflame the racial and social prejudices of the jury. Petitioner was questioned about his past and present appearance although his identity was never in doubt. Other witnesses were questioned about their social relationships with black persons although where they went and what they did during these outings was not at all relevant to whether or not the alleged sale of heroin to Shaw was ever made by Petitioner.

In its Reply Respondent states at page 10, "It might also be pointed out that this record does not reveal whether the undercover agent was white or black." Petitioner wishes to correct this false statement by quoting the applicable sections of the Court record of the testimony of H. O. Forgy, III, as follows:

> Q. 63. Actually *Shaw is a black man*, isn't he?
>
> A. *That's right.*
>
> Q. 64. Well, hasn't your father been active in Civil Rights which is primarily for the black person?
>
> A. That's right.
>
> Q. 65. Would you tell us then why this black man would come in here against your father?
>
> (T.R. 106) (Emphasis added)

The State attorney's questions relating to Petitioner's beard, longer mustache and longer hair provided sufficient information to kindle the innuendo that Petitioner was a member of the "hippie" sub-culture. Furthermore, the State attorney's questions concerning the profession of Jimmy Patterson and the trips he took to Memphis were sufficient to imply that he was involved in drug trafficking even though Patterson answered the proposed questions in the negative. Race was brought up in reference to the bi-racial friendship between Petitioner and Buck Brown as well as the questions to Patterson, "Did you make any trips from Memphis with any other colored boys other than Buck Brown?" (R.133) and "Weren't you there one night when you met Buzz Shaw, you and another colored girl and also Moose Hannah?" (R.137)

Regardless of the Respondent's excuses for pursuing these questions, the prejudicial innuendo produced by such a line of questioning is undeniable. The State itself relies on prejudice in its argument forcing Petitioner into an arbitrary class merely because he has long hair. Quoting the Tennessee Court of Criminal Appeals, Respondent's reply reads at page 11:

> "If the defendant assumed the guise and physical appearance which categorized him as a 'hippie' and therefore a member and participant of the drug culture, it is certainly not the State which places him in the category by inquiring into his manner of dress and appearance."

The length of Petitioner's hair and manner of dress do not justify his being arbitrarily classed as a "hippie" necessarily connected with the drug culture.

This is precisely the point of Petitioner's Complaint. The entire record is tainted by such arbitrary classifications coupled with prejudicial innuendo. No man stands to be convicted because of his appearance or associations.

Petitioner prays that this flagrant violation of his Constitutional rights to due process and/or equal protection of the law be rectified.

Question Two

As stated by Petitioner:

(2) Were Petitioner's Constitutional rights to due process and/or equal protection of the law violated by allowing the conviction to be sustained on the uncorroborated testimony of an accomplice, when Tennessee law clearly states that the uncorroborated testimony of an accomplice is not sufficient to sustain a conviction?

As stated by Respondent:

(2) Is an undercover agent an accomplice under the laws of Tennessee so that his testimony must be corroborated, and if so, does this raise a federal constitutional question?

Petitioner argues that the alleged undercover agent, Shaw, operated outside his jurisdictional limits, and, therefore, can be deemed an accomplice. Tennessee consistently requires that the testimony of an accomplice be corroborated to sustain a conviction.

Respondent answers with a repertoire of Tennessee statutes and other quotations of law. These citations deal with an individual who has acted within his jurisdictional limits. In the instant case the alleged activity admittely took place five or six miles outside the city limits of Jackson, Tennessee, by whom Shaw was employed.

Furthermore, Hespondent argues that Shaw did not have the necessary intent to commit the crime alleged. Petitioner argues

that the sale of heroin is an act *malum in se* which requires no specific intent on the part of the participant. Shaw was five or six miles outside his jurisdiction allegedly participating in an act that Petitioner contends, requires no specific intent. The alleged sale could not take place without a buyer. Shaw allegedly was that buyer and was an accomplice.

Wharton's Criminal Evidence, Volume 2, 12th Edition 1955 §448 states.

> "To constitute one an accomplice, he must perform some act or take some part in the commission of the crime or owe some duty to the person in danger that makes incumbent on him to prevent its commission. An accomplice is one culpably implicated in, or who unlawfully co-operates, aids, abets, or assists in the commission of the crime charged."

Petitioner submits that, if the State's contention that the sale of heroin was made is accepted for the sake of argument, Shaw did, in fact, unlawfully co-operate, aid, abet and assist in the alleged sale. If the testimony of Shaw is to be believed it sustains Petitioner's contention that Shaw is, indeed, an accomplice. Shaw allegedly drove Brown and himself to the trailer to make the purchase, and allegedly purchased the drug for himself and help arrange the sale to Brown. Mr. Shaw testified as follows regarding the circumstances of the alleged sale of heroin:

> Q. 36. How did you go out there? Did you go in your car or Buck Brown's or walk or what?
>
> A. We were in my automobile. (T.R. p. 36)

Shaw allegedly made a purchase of two packages of heroin, one for himself and one for Brown and left his wrist watch as security for both purchases.

Q. 73. Did you agree to pay any money? Did you say a few minutes ago that you put your watch up and you would pay him later? Is that what you said?

A. Yes, sir.

Q. 74. What was the agreement as to the payment then?

A. I was to pay him $10.00 for the substance that I bought and $10.00 for the package Mr. Brown had. Mr. Brown asked me for a loan and I told him I didn't have any money so, therefore, put my watch up for both packages.

Q. 75. You stood for what Brown got and paid $10.00 for his and $10.00 for the other?

A. Yes, sir.

By his own testimony it appears Shaw certainly aided and abetted in the alleged sale of heroin to Buck Brown. In *United States v. Wilson* (D.C. Wash. 1932) 59 F. 2d 47, the Court held that persons who furnish material, ordinarily used for legal purposes, with knowledge that the material was to be used for the unlawful manufacture of liquor are guilty of aiding and abetting or conspiring to violate prohibition laws. In *Mays v. United States* (8th Cir. 1958), 261 F. 2d 662, the Court sets out this criteria: "In a prosecution for the unlawful sale of heroin the record disclosed sufficient evidence to support a finding of defendant's guilt as an aider and abettor inasmuch as it was shown that defendant associated himself with the sale of heroin and sought to bring about the sale."

This Honorable Court has stated the test to be applied in determining whether a person is an aider or abettor in *Nye & Neissen v. United States* (1949), 336 U.S. 613, 69 S. Ct. 766 at page 769:

> "In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about and that he seek by his action to make it succeed."

Shaw allegedly purchased the package of heroin for Brown and thus by his acts participated in the crime and insured its success.

A long line of Tennessee cases has held that the alleged victim in an incestuous relationship is an accomplice of the perpertator of the crime and her damning testimony requires corroboration to support a conviction. *Scott v. State* (1960), 207 Tenn. 151, 338 S.W. 2d 581, *Shelly v. State* (1895), 95 Tenn. 152, 31 S.W. 492, *Sherril v. State* (1959), 204 Tenn. 437, 321 S.W. 2d 811.

In analogy Shaw, the recipient of the substance in the alleged sale, is clearly an accomplice in accordance with the above well-established law.

Tennessee law is clear on the point that the testimony of an accomplice must be corroborated to sustain a conviction and that such a conviction based on the uncorroborated testimony of an accomplice is prejudicial error. *Kinchelow v. State* (1844), 24 Tenn. 9, 5 Hump. 1; *Robinson & Jones v. State* (1855), 84 Tenn. 146, 16 Lea 123; *Clapp v. State* (1895), 94 Tenn. 186, 30 S.W. 214; *Smartt et al. v. State* (1904), . . . S.W. 2d 452; *Ripley v. State* (1950), 189 Tenn. 681, 227 S.W. 2d 26; *Hicks v. State* (1912), 126 Tenn. 393, 88 S.W. 2d 452; *Moore v. State* (1968), 1 Tenn. Cr. App. 190, 432 S.W. 2d 684.

Tennessee's peculiar law created a class wherein Petitioner is protected. In his trial Petitioner was denied such protection

because he was, indeed, convicted upon the uncorroborated testimony of an accomplice.

Respondent argues in its Reply at page 7, "For the law to supply the necessary criminal intent when the border is passed would be against sound policy." Petitioner submits that it would be in vioaltion of sound policy and fundamental due process of law to clothe a municipal police officer with all of the rights and powers of his municipal post when he is five miles outside the jurisdictional limits of the municipality that employed him, without the approval of a proper law enforcement agent in that jurisdiction.

Petitioner prays that his Constitutional rights be upheld and that his Petition for Writ of Certiorari be granted and the conviction reversed.

Respectfully submitted

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Attorneys for Petitioner

Certificate of Service

I, Henry V. Sutton, one of Petitioner's attorneys, hereby certify that a copy of the foregoing Rebuttal to Reply of Respondent has been served via U. S. mail, postage prepaid, on the Attorney General of the State of Tennessee at his offices located in the Supreme Court Building, Suite 414, Nashville, Tennessee 37219, on this the 14th day of November, 1974.

Henry V. Sutton